

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-211732

DATE: October 11, 1983

MATTER OF: Radiation Systems, Inc.

DIGEST:

1. Where protester by letters within 10 working days of rejection of its proposal adequately conveys its dissatisfaction with agency technical evaluation and asks for corrective action (reconsideration by agency), protest submitted to GAO within 10 working days of agency affirmation of evaluation results is timely.
2. Contracting officer's rejection of technical proposal submitted under first step of two-step formally advertised procurement was proper since proposal was reasonably determined to be unacceptable for valid technical reasons under stated evaluation criteria.
3. Protest filed after agency's rejection of technical proposal of small business alleging that determination to reject proposal was tantamount to nonresponsibility determination which should have been referred to the Small Business Administration under certificate of competency program, is without merit because responsibility type criteria in a solicitation may be legitimately used to evaluate an offer to perform an agency's requirements with stated resources set forth in an offeror's technical proposal.

Radiation Systems, Inc. (RSI), a small business, protests the rejection of its technical proposal as unacceptable under request for technical proposals (RFTP) No. DAAB07-83-R-J521 issued by the U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey, as the first

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step of a two-step formally advertised procurement. RSI contends that the rejection of its proposal was not rationally founded since RSI did supply certain information in its proposal which the Army's evaluators found lacking. RSI also alleges that, under the circumstances of this case, the Army's determination to reject its proposal amounted to a nonresponsibility determination which should have been referred to the Small Business Administration for consideration under the certificate of competency program. We deny the protest.

Background

This case involves the Army's procurement of 72 Quick Reaction Satellite Antennas, associated data and training. The item is a highly complex, mobile communication system for use with tactical satellite terminals. The solicitation contemplated a multi-year contract with options for an additional 159 items.

The Army initiated step one on January 6, 1983, when it issued the RFTP. Step one entails the request for, and the submission, evaluation, and, if necessary, discussion of a technical proposal, without pricing, to determine the acceptability of the items offered. Conformity to technical requirements is resolved in this step but consideration of an offeror's responsibility during step one evaluation of technical proposals is not permitted. The second step consists of a formally advertised procurement confined to those offerors who submitted an acceptable proposal in step one. See Defense Acquisition Regulation (DAR) § 2-501 et seq. (1976 ed.).

The RFTP detailed the Army's evaluation factors and subfactors. To participate in step two an offeror had to receive an acceptable rating in all factors, subfactors, and elements. The RFTP contained the following major areas of evaluation: (1) Technical Approach; (2) Support; and (3) Management/Manufacturing. Under technical approach, system performance was the factor which was stated to be of greater weight than two other listed factors combined and was thus the principal basis for evaluation of the acceptability of a proposal's technical approach. Support was a factor of greater weight than management/manufacturing.

The RFTP required that proposals "address each aspect of the technical requirements"; demonstrate a "comprehensive knowledge and understanding of the scope and degree" of the technical efforts required for successful performance of the work; and show the offeror's understanding of the "detailed aspects" of the problems involved as well as providing specific approaches for their resolution. The solicitation cautioned offerors that any omission of information considered significant to the achievement of technical requirements would be cause for considering the proposal unacceptable. The solicitation further warned offerors that "parroting" of RFTP words, with a mere statement of intent to perform, would not be acceptable.

The Army technical evaluation team evaluated the technical proposals received and concluded that the technical proposal submitted by RSI so failed to meet the essential requirements of the RFTP that the deficiencies could not be cured without major revisions. On April 5, 1983, RSI was accordingly advised that its proposal was found to be technically unacceptable because it failed to meet the minimum essential requirements of the Government. The letter also stated that the proposal merely parroted many solicitation specification requirements in critical technical areas. The letter, with an enclosure, listed numerous specific deficiencies including many under the factor system performance, the most important in the technical approach evaluation area. After receipt of the April 5 letter, there followed correspondence between RSI and the contracting officer in which RSI requested reconsideration of the Army's determination. On April 22, the contracting officer informed RSI that the position of the Army with respect to the unacceptability of RSI's proposal remained unchanged. This protest followed.

Timeliness

Our Bid Protest Procedures provide that a protest such as this must be filed not later than 10 working days after the basis for protest is known or should have been known, either with the contracting agency or with our Office. 4 C.F.R. § 21.2 (1983). If a protest is filed initially with the contracting agency, any subsequent protest to our

Office must be filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action with respect to the protest. Id. As stated previously, the Army notified RSI on April 5 that its proposal had been determined to be unacceptable. Within 10 working days of the rejection of its proposal, RSI by two separate communications advised the Army as follows:

"A cursory review of [the rejection letter] discloses numerous errors in your evaluation as well as a misunderstanding of our proposal. As we do not agree with your evaluation and judgment, we are conducting a detailed study [and] will provide further details and explanations of our objections." (April 8, 1983 RSI telegram.)

* * * * *

"We have reviewed the [rejection letter] and find that it contains many comments which are factually incorrect. * * *

"In view of the errors made in the evaluation of our proposal, we feel it would be only fair for the Government to reconsider its decision and to find that our proposal is at least 'susceptible of being made acceptable.' Such a decision would give the Government the benefit of subjecting the procurement to full competition.

"As a small business firm, RSI desires to compete in the second step of the procurement.

"Please advise promptly as to the Government's position so that we can take appropriate action." (April 12, 1983 RSI letter.)

RSI's letter of April 12 also contained an enclosure, which, on its face, briefly rebutted the specific deficiencies

contained in the Army's April 5 rejection letter, pointing out technical material in its proposal which the Army found lacking. RSI's letter also contained an apparently late technical supplementation of certain portions of its proposal.

The Army contends that RSI's communications with the contracting officer did not constitute a protest and therefore concludes that RSI's protest to our Office is untimely because it was filed on May 9, 1983, more than 10 days after RSI received the Army's initial rejection letter. The Army argues that RSI's communications were not couched in terms of a protest and should be viewed merely as a continuing questioning by RSI of the Army technical evaluation results as well as a belated attempt to supplement RSI's technical proposal. The Army also argues that RSI's communications did not lodge any specific objections to the procedures used by the Army in evaluating proposals and did not allege any arbitrary conduct or violation of procurement laws or regulations on the part of the Army. The Army notes that procuring officials enjoy a reasonable degree of discretion in evaluation of proposals and maintains that RSI's contentions concern purely discretionary agency action, well within the agency's authority, and do not allege a redressable legal "wrong." The Army thus concludes that RSI's communications did not rise to the level of a protest and that its subsequent protest to our Office was untimely.

We consider RSI's communications to the Army, which were filed within 10 days of RSI's receipt of the Army's April 5 rejection letter, as a timely protest to the agency. While RSI did not use the word "protest," its communications to the Army following rejection of its proposal clearly contained an expression of dissatisfaction (the rejection of its proposal was a result of "numerous errors in [the] evaluation" with which RSI disagrees) and a request for corrective action (request to the Army to reconsider its decision). These are elements of a timely protest. Prosearch, B-206316, June 30, 1982, 82-1 CPD 636. Here, RSI, in an enclosure to its April 12 letter, also attempted to rebut the Army's findings concerning the technical unacceptability of its proposal. Since we encourage firms

to seek "resolution of their complaints" initially with the contracting agency, we believe that our interpretation of what constitutes an agency protest should not be overly restrictive or unduly technical. See 4 C.F.R. § 21.2(a). In this regard, we think that the Army's argument that RSI did not specifically allege procedural irregularities, arbitrary conduct, or other unlawful actions on the part of the Army and that therefore RSI's communications should not be held to toll the time period for filing a bid protest with our Office reflects an interpretation of RSI's communication which is too literal. RSI's allegations that "numerous errors" occurred in the evaluation which resulted in the rejection of its proposal clearly implies improper action by the Army. Thus, we believe that RSI's protest is timely with respect to the agency's actual evaluation of its proposal.

The Agency's Evaluation

As stated above, the contracting officer's letter of April 5, advising RSI that its proposal was determined technically unacceptable, listed and briefly described the areas in which the proposal was considered deficient. In addition, the Army, in its agency report, furnished our Office a detailed discussion of the Army's technical evaluation of RSI's proposal and the reasons why the proposal was rated unacceptable. Further, the Army has furnished our Office the original evaluation documents, such as the technical team chief's summary of evaluation results and other contemporaneous documents. While we have considered the entire record, we intend to concentrate upon those matters we believe to be dispositive. Further, as explained below, since RSI has not directly challenged the technical judgment of the Army's evaluators, we believe it would serve no useful purpose to recount in detail all the technical reasons which resulted in the rejection of RSI's proposal.

Under the RFTP's evaluation scheme, system performance was the most important rated factor in evaluating an offeror's technical approach and was accorded twice the

weight as the other two factors which comprised that evaluation area. This factor contained 16 subfactors, other than testing, which were subject to evaluation. For example, with respect to RSI's discussion of system performance, the evaluators' findings under 5 of these subfactors were as follows:

1. Intermodulation Products

The solicitation required detailed discussion of intermodulation products and an approach demonstrating technical compliance with the specifications. RSI presented a rudimentary discussion which failed to present adequate solutions or, in some instances, omitted any discussion of proposed solutions. Portions of the proposal were vague, unclear and missing pertinent information. RSI's discussions also contained internal inconsistencies.

2. Budget for System Gain to Noise Temperature Ratio

RSI's proposal did not substantiate the amplitude and phase response budgets. The proposal was "extremely high risk" as feed waveguides, waveguide switches, couplers, filters, and sub-reflector support structure losses were not addressed. RSI's G/T budget is totally unacceptable due to the major omissions and lack of understanding reflected in its proposal.

3. Budget for Effective Isotropic Radiated Power

RSI presented a "very naive" and simplistic approach to transmit loss estimation with no accounting of individual itemized losses for couplers, transitions, filters, waveguide windows, which indicated that RSI did not fully understand the details involved. Even where some items are discussed, such as amplitude and phase response, the discussion merely parrots the specifications without detailed supporting analysis.

4. Antenna Structure, Drives Waveguide, Dehydrator

RSI provided a very rudimentary discussion of the support structure, positioning frame and pallet, providing

insufficient information to determine how these items were designed or if the proposed antenna will withstand the environmental factors required by the specifications for both the operational and non-operational mode. RSI presented virtually no detail on the dehydrator and pressurization of the waveguide system. Further, RSI provided no weight budget or weight analysis to support their estimated weight claim for the item. Since accurate determination of the center of gravity is critical to mobility/transportability of a tactical communication system, this portion of RSI's proposal is also unacceptable.

5. High Altitude Electromagnetic Pulse (HEMP)

RSI's proposal fails to comply with solicitation requirements as the proposal lacked significant details on the approach to HEMP harden the antenna. Major omissions are: (1) discussion of expected HEMP pulse energy distribution, (2) estimate of expected bulk currents on the antenna structure, and (3) threshold levels to damage or upset electronic components. RSI's discussion fails to demonstrate understanding of designing against HEMP and is therefore considered unacceptable.

In the remaining subfactors under system performance, the Army also found RSI's proposal deficient under the following subfactors: (1) assembly/disassembly plan; (2) high/low risk approach; (3) maintainability; (4) reliability; (5) transportability; and (6) site layout. Altogether, RSI's proposal was rated unacceptable under 10 of 16 subfactors in the area of system performance other than testing.

Contentions by RSI concerning the Army's Evaluation

RSI characterizes its protest as "nontechnical" in nature and states that it does not ask our Office to reevaluate its proposal from a technical standpoint. Rather, RSI points to the April 5 letter from the Army which contained an enclosure briefly listing 18 specific deficiencies and briefly giving the reasons why RSI's proposal was unacceptable. Of the 18 deficiencies listed, RSI has not directly

challenged 15 with any detailed substantiation of its reasons for disagreement, including all the areas listed above concerning system performance. Rather, RSI contends that the Army erroneously found that the firm "did not discuss" a test schedule, automation, or production testing, 3 of the 18 areas found deficient. RSI then references the portions of its proposal where these areas were in fact discussed and concludes that the contrary findings of the Army are clearly wrong because RSI did in fact supply the information which the Army claimed was not supplied. RSI then contends, without additional specifics, that these "errors" are only representative examples of mistakes committed by the Army during the evaluation and which renders arbitrary the Army's entire rejection of RSI's proposal. Despite the Army's subsequent detailed technical explanation of its reasons for rejecting RSI's proposal, RSI has continued to assert that the only issue before our Office is whether the RFTP called for "specific information" and then for our Office to ascertain whether RSI did in fact supply the information. RSI does not attempt to rebut the very detailed and technical point-by-point reasons advanced in the agency report by the Army to support its determination. Rather, RSI characterizes the Army's technical reasons for rejecting its proposal as "new reasons" which are beyond the requirements of the clear language of the RFTP as to the sufficiency and detail of information requested. In this connection, RSI argues that the RFTP only required an outline of major problems anticipated which RSI reasonably interpreted to require a certain amount of detail. Any ambiguity in the amount and detail of information required should therefore be resolved against the Army. RSI concludes that its proposal was at least "susceptible to being made acceptable" and our Office should so find.

Decision on the Merits

We will review whether an agency's evaluation was fair and reasonable, and whether it was consistent with stated evaluation criteria. See A.T. Kearney, Inc., B-196499, April 23, 1980, 80-1 CPD 289. We will also ordinarily accept the considered technical judgment of the procuring agency's specialists and technicians as to the adequacy of a technical proposal, unless it is shown that the agency

action was erroneous, arbitrary, or not made in good faith. Guardian Electric Manufacturing Company, 58 Comp. Gen. 119, 125 (1978), 78-2 CPD 376.

The protester correctly points out that the first step of two-step formal advertising, in furtherance of the goal of maximized competition, contemplates the qualification of as many proposals as possible through discussions, and that an agency should make reasonable efforts to bring step-one proposals to an acceptable status. Angstrom, Inc., 59 Comp. Gen. 588 (1980), 80-2 CPD 20. However, an agency should not permit an offeror to remedy major proposal defects, including failure to comply with a material requirement, when such defects could only be cured through extensive revision. Angstrom, Inc., supra.

Whether a proposal requires extensive revision is a function of the materiality of the proposal's deficiencies. Deficiencies are material to the extent they fail to show compliance with the solicitation's requirements and/or show a lack of understanding of such requirements. If a solicitation expressly requires detailed information, it is the responsibility of offerors to provide adequate information for the evaluation of their proposals under the established criteria. Universal Design Systems, Inc., B-196682, April 23, 1980, 80-1 CPD 290. While individual deficiencies may be susceptible to correction, the aggregate of many such deficiencies may preclude an agency from making an intelligent evaluation, and the agency is not required to allow an offeror the opportunity to rewrite its proposal. See Informatics, Inc., B-194926, July 2, 1980, 80-2 CPD 8 at page 5.

The Army states that the major deficiency of RSI's technical proposal was its failure to demonstrate a comprehensive knowledge and clear understanding of the scope and degree of work required for successful delivery of conforming items. According to the Army, the information provided by RSI was simply insufficient to demonstrate its understanding of the detailed aspects of the problems involved, failed to provide adequate technical approaches to resolving potential problems or show correct interpretation of specifications as required by the RFTP. The Army concludes that

the proposal so failed to meet the requirements of the RFTP that correction would necessitate a major revision of RSI's technical proposal. The protester has not shown that the Army's position is unreasonable.

While RSI characterizes its protest as "nontechnical," we think the opposite is true. The record shows that the Army made detailed technical findings during evaluation concerning the acceptability of RSI's proposal and found it to be deficient. Thus, in the most important technical approach area of system performance (other than testing), the Army rated RSI's proposal deficient in 10 out of 16 subfactors for specified detailed technical reasons which RSI has not technically rebutted. The Army characterizes RSI's failings in its proposal as critical technical deficiencies which could be cured only by major revision. RSI's protest mainly rests on the brief reasons listed by the Army in its April 5 rejection letter as the basis for challenging the Army's findings. Any fair reading of this enclosure shows it to be a cursory listing of areas found deficient without any detailed technical explanation. During the protest, the Army did furnish detailed technical backup material which explained its numerous reasons for rejecting RSI's proposal. However, the protester continued to rely on the three alleged erroneous findings by the Army in the enclosure to the April 5 letter that RSI failed to furnish certain information which RSI insists it did furnish. The protester has not otherwise attempted to materially rebut the technical findings of the Army in the other areas.

The protester has the burden of affirmatively proving its case. Reliable Maintenance Services, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. We think that RSI's arguments consist of a small sample of the Army's findings, which the Army argues are nonrepresentative, and then arguing "by way of example" that the other findings are also arbitrary or erroneous. We think the protester's arguments are without merit. In this regard, a determination by evaluators that a proposal, as a whole, fails to demonstrate technical understanding because, among other things, insufficient information was provided is just as much a technical judgment by the evaluators as a clear

finding of technical error or noncomformance in a proposal. The Army states that even without the three allegedly erroneous findings contested by the protester, the evaluation results would still stand. We think that the Army's position is reasonable.

Our review of the record shows that the determination to reject RSI's proposal simply did not turn upon whether RSI supplied certain information cited in the April 5 letter. Rather, the proposal was rejected for technical reasons, such as failing to demonstrate an understanding of major technical areas required by the RFTP. We therefore think that the determination to reject the proposal has not been shown to result from other than a valid technical judgment of the Army's evaluators under the stated evaluation criteria.

Concerning RSI's argument that the Army was imposing new technical requirements by requiring excess detail in the proposals, we have already set forth the RFTP's requirements that each proposal must show "comprehensive" knowledge and understanding of the scope of effort required and that detailed information must be provided. We believe that RSI's arguments in this regard again merely question the technical judgment of the evaluators as to how much detail is required to show adequate understanding on the part of an offeror. As stated previously, the protester has not shown the Army's determination in this regard to have been unreasonable. Accordingly, we conclude that the Army's determination to reject RSI's proposal was a valid exercise of administrative technical judgment.

Referral to the Small Business Administration

RSI essentially argues that a review of the Army's evaluation findings shows that RSI's "parroting/lack of understanding or the inability of the Army to evaluate [RSI's] understanding" was the principal basis for rejecting RSI's proposal and that responsibility-type factors otherwise permeated the evaluation results. Thus, RSI states that when the Army decided to reject the proposal for the alleged reason that RSI did not have the ability to timely and reliably perform the contract, the Army was legally

obligated to refer the question to the Small Business Administration for consideration under the certificate of competency program (COC).

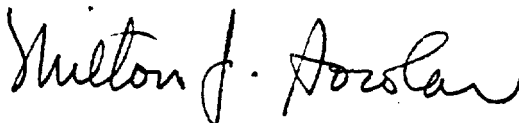
Radiation acknowledges the existence of responsibility type factors in the evaluation criteria; it acknowledges that such factors can be properly considered in the evaluation of the first-step proposal of a large business and that these factors can arguably be considered in the evaluation of a proposal from a small business so long as these factors do not contribute to rejection of the small business proposal. Radiation believes that an agency may not reject a small business technical proposal on the basis of responsibility type factors in a two-step procurement without referring the matter to the SBA for possible issuance of a COC under the Small Business Act, 15 U.S.C. § 637(b)(7) (1982), which grants the "SBA comprehensive authority to review all responsibility related decisions."

We do not agree with these contentions. The factors considered in the evaluation of technical proposals, both those related to purely technical matters and those involving "traditional" responsibility matters, relate to the offerors' attempt to demonstrate the technical ability and competence to meet the agency's needs. The proposals thus were offers to perform a particular requirement in particular ways, using certain resources presumably available to the offeror for this purpose. Evaluation of proposals in this respect serves a distinctly different purpose than does a traditional responsibility determination. All evaluation factors, whether relating to traditional concepts of responsibility or to technical approach, are used to assess the merits of individual proposals. This is so whether the agency is concerned with the relative merits of a proposal in a negotiated procurement, Design Concepts, Inc., B-184754, December 24, 1975, 75-2 CPD 410, or whether the evaluation is used to determine the acceptability of a first-step technical proposal in procurements conducted under two step formal advertising procedures. See DAR § 2-501 et seq. In either case, overall technical acceptability and desirability, not responsibility, is what is being determined.

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Thus, no matter how capable an offeror may in fact be, the firm must submit an adequately written proposal, if it is to be considered. Cf. Center for Employment Training, B-203555, March 17, 1982, 82-1 CPD 252. On the other hand, whether an offeror has or can obtain the resources to do the work in the manner proposed is a matter of responsibility. In our opinion, the Small Business Act does not eliminate the essential distinction between proposal evaluation and responsibility. This portion of its protest is without merit.

The protest is denied.

for 
Comptroller General
of the United States